lege of salvaging from the rubbish articles of value. The city having failed for four months to furnish four of the dumps as specified, the plaintiff elected to rescind the contract and sued to recover the amount of the bond which he had posted to insure performance. *Held* (three Justices dissenting), it was error to allow the jury to find that such failure on the part of the city was not a substantial breach. *Clarke Contracting Co.* v. *City of New York* (N. Y., 1920), 128 N. E. 241.

It has been settled since the decision of Lord Mansfield in *Boone* v. *Eyre*, 1 H. Bl. 273, n., that where mutual promises go to the whole of the consideration on both sides, such promises are conditions precedent, the one to the other, and breach of one gives the other party the right to rescind the contract. *Hoare* v. *Rennie*, 5 H. & N. 19; *Phillips & Colby Const. Co.* v. *Seymour*, 91 U. S. 646; *Dwinel* v. *Howard*, 30 Me. 258; *Tool Co.* v. *Shoe Machinery Co.*, 181 Mass. 275. The rule applies as well where there has been part performance by the party committing the breach as where the contract is entirely executory. *Clark* v. *West*, 122 N. Y. S. 380; *Hodgkins* v. *Moulton*, 100 Mass. 309; *Boyle* v. *Guysinger*, 12 Ind. 273. A case of rescission for breach by the other party is essentially one of failure of consideration, and the question is whether the failure is sufficiently important to excuse performance by the aggrieved party. *Norrington* v. *Wright*, 115 U. S. 188; *Morgan* v. *McKee*, 77 Pa. St. 228; *Wiley* v. *Athol*, 150 Mass. 426. The determination of this question depends upon the particular facts of any given case. *Boston Blower Co.* v. *Brown*, 149 Mass. 421. In the principal case the materiality of the breach was decided as a matter of law, and it was here that the court divided, the minority being of opinion that the question had properly been left to the jury. Construction of written contracts, like other instruments in writing, is a question of law for the court. *Aaron* v. *Telephone Co.*, 84 Kan. 117. And it is difficult to see why it should not be a part of such construction to determine whether the failure of consideration on one side was of sufficient importance to excuse performance of the promise on the other. See 28 LAW Q. REV. 400. Granting the difficulty of the situation as pointed out in the dissenting opinion of Pound, J., and admitting, as is said in WILLISTON ON CONTRACTS, § 841, that "The test is whether, on the whole, it is fair to allow damages merely or to excuse performance entirely," still no rational ground appears for substituting the opinion of the jury for that of the court upon a clear question of law.

CONTRACTS—MUTUALITY.—The plaintiffs agreed to purchase from the defendant "their entire consumption of vulcanized fibre and insulating papers, covering a period of one year." On demurrer, *held*, since the declaration fails to show whether plaintiff had an established business, and therefore whether the quantity bargained for was capable of reasonably correct estimate, it is insufficient. *American Trading Co.* v. *National Fibre & Insulation Co.* (Del., 1920), 111 Atl. 290.

The plaintiff agreed to furnish "the coal that the defendant would want to buy of the plaintiff" for a certain period, at fixed price, etc. *Held*, the con-

tract was void for lack of mutuality of obligation. *Wickham & Burton Coal Co.* v. *Farmers' Lumber Co.* (Iowa, 1920), 179 N. W. 417.

It is unfortunate that there should be the confusion and diversity that is found in the authorities as to the validity of so convenient and common a type of contract as those here involved. The trouble arises from the failure of some courts to realize that there is, of the three used, but one true criterion by which to test such agreements. namely, the presence of consideration. The test should not be for mutuality, nor for certainty and definiteness. While these ordinarily accompany and indicate consideration, they are not indispensable. There is clear-cut, carefully reasoned authority, both early and recent, for this view. *L'Amoreux* v. *Gould,* 7 N. Y. 349; *Jenkins & Co.* v. *Anaheim Sugar Co.,* 247 Fed. 958; *Ramey Lumber Co.* v. *John Schroeder Lumber Co.,* 237 Fed. 39; *Bartlett Springs Co.* v. *Standard Box Co.,* 16 Calif. App. 671. But decisions put on the unsatisfactory basis of mutuality and certainty are numerous. *Bailey* v. *Austrian,* 19 Minn. 535, is still cited. In *Joliet Bottling Co.* v. *Joliet Citizens' Brewing Co.,* 254 Ill. 215, it was held that an agreement by the brewery to furnish beer to satisfy the bottling company's demand was void for lack of mutuality and certainty. In contrast to the holding of the court in *Ayer & Lord Tie Co.* v. *O. T. O'Bannon & Co.,* 164 Ky. 34, that a contract to furnish all the ties the vendor "could deliver" was good, we have the decision in *Hudson* v. *Browning,* 264 Mo. 58, decided the same year, that a contract to furnish all the ties "his time, money and effort would permit," was void. See 13 MICH. L. REV. 682. Whether there is consideration in a given case must, of course, depend on the facts thereof and the intention of the parties as it can be interpreted from the words they used. If performance as promised by either is dependent merely upon his wish, whim, desire, convenience, etc., it is illusory and is not sufficient consideration for another promise; but if the promise is to buy of the other and no one else, to buy of that other his business wants, needs, or requirements for a certain time, it may well be a substantial promise and therefore good consideration. See WILLISTON ON CONTRACTS, Vol. I, 314, 315. Giving up one's legal right to buy elsewhere is sufficient consideration, although one has no established business upon which to base a "reasonably correct estimate." *Bartlett Springs Co.* v. *Standard Box Co., supra.* It would seem that consideration could easily have been found in the Delaware case noted above. The Iowa case is probably right in result, not because there was no mutuality of obligation, but for the reason that such a promise is insufficient as consideration. See 12 MICH. L. REV. 677, for a discussion of this type of contract as applied to automobile agency agreements, and also 18 MICH L. REV. 409, especially for interpretation of the word "requirements."

CONTRACTS—OFFER AND ACCEPTANCE—SILENCE—STATUTORY PROVISION AS TO INSURANCE POLICY.—A North Dakota statute (Sec. 4902, C. L. 1913) provides that "Every insurance company engaged in the business of insuring against loss by hail * * * shall be bound, and the insurance shall take effect